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IN THE

Supreme Court of the United States

October Term, 1968

No. [redacted] 6

JOSEPH CARROLL, RICHARD NORTON, J. B. STONER, CHARLES LYNCH, ROBERT LYONS, WILLIAM BRAILSFORD, and the NATIONAL STATES RIGHTS PARTY,

Petitioners,

—v.—

THE PRESIDENT and COMMISSIONERS OF PRINCESS ANNE, COUNTY COMMISSIONERS OF SOMERSET COUNTY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

Joseph Carroll, Richard Norton, J. B. Stoner, Charles Lynch, Robert Lyons, William Brailsford, and the National States Rights Party pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Maryland, entered in the above-entitled case on June 7, 1967.

Citations to Opinions Below

The opinion of the Court of Appeals of Maryland is reported in 247 Md. 126 (1967), and is printed in the Appendix, *infra*, pp. 1a-12a.

Jurisdiction

The judgment of the Court of Appeals of the State of Maryland was entered on June 7, 1967. On September 6, 1967 Mr. Justice Black extended the time within which to file this petition for certiorari until October 5, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3) since rights, privilege and immunities are claimed under the Constitution of the United States.

Questions Presented

1. Whether an *ex parte* temporary injunction barring petitioners from holding any public meetings for ten days was an invalid prior restraint in violation of the First and Fourteenth Amendments.

2. Whether the issuance of the *ex parte* temporary injunction was justified by the existence of a clear and present danger.

Statement of Case

Petitioners, members or officers of the National States Rights Party, a political organization, participated in an outdoor political meeting on August 6, 1966, in front of the courthouse in the town of Princess Anne, the county seat of Somerset County, Maryland (R.[1] 33, T.[2] 84). The rally continued from 7:00 P.M. to 8:25 P.M. (T. 45). No violence

[1] "R" refers to the certified record filed with the Clerk of the Court.

[2] "T" refers to the transcript of the hearing on the injunction which is part of the certified record but separately paginated.

occurred (T. 84), and no arrests were made (T. 47, 56). Near the end of the rally Richard Norton, one of the speakers, announced that another rally would be held by the Party on the following evening (TT.[3] 62-63).

On the following day, August 7, 1966, the President and Commissioners of the town of Princess Anne and the County of Somerset secured an *ex parte* injunction forbidding petitioners from holding another meeting for ten days until the matter could be heard in the Circuit Court for Somerset County (T. 8). The order instructed petitioners to appear on August 17, 1966, to show cause why they should not be permanently enjoined from holding such rallies in Princess Anne (R. 7-8).

At the rally of August 6, 1966,[4] the aims and tenets of the National States Rights Party were described by Party attorney, J. B. Stoner (TT. 14), as follows (TT. 19-20):

> Now the National States Rights Party is a political party. In some parts of the country we run our white supremacy candidates on the general election ballot and in other places we run in the Democratic and Republican primaries. We intend to gain political power and to repeal not only the Civil Rights Act of 1965 but all of the Civil Rights Acts including the one that the distinguished Congress is now passing through.

In keeping with these aims, the speakers variously exhorted their hearers to "organize [to] win every single

[3] "TT" refers to the transcript of the speeches presented at the meeting of August 6, 1966, which is part of the certified record but separately paginated.

[4] The entire meeting was recorded by state officers. The tape was introduced at the August 17, 1966 hearing (T. 85).

political objective" (TT. 62) and to "organize intelligently, fight intelligently" (TT. 26). Governor Agnew and "Joe Alton . . . down in Annarundel County" were specifically criticized for their plans regarding integration (TT. 8-9). The Party intended to "fight in the Courts every legal way we can to smash these vermin, to smash them (sic) (inaudible) plan to assimilate the white race" (TT. 8). They vowed to "continue to speak for white America" (TT. 43), and beyond "one or two speeches, we're going to be in Court Monday" to attack as illegal injunctions against their picketing while courts nevertheless allow Negroes to picket (TT. 44). They counterposed "white power" to "black power" (TT. 18-19), and told the crowd that "The National States Rights Party advocates every legal, legitimate and political (inaudible) in the book to stop race-mixing" (TT. 18).

During the rally the Party informed the audience how to become members (TT. 9, 58, 62). Party literature was also distributed (TT. 20-21).

Party speakers discussed the white supremacist view on several political issues, including school integration (TT. 10, 15), federal aid (TT. 11, 17, 19), federal school desegregation guidelines (TT. 16, 18), the Rumford Fair Housing Act in California (TT. 46), and the Negro movement and its demands (TT. 23, 24, 33), all of which were denounced. In particular the speakers emphasized the local political situation, several times exhorting the crowd to "phone . . . write, [and] buttonhole John Bond," the head of the [local] school system, to bring political pressure on him to the end that local schools not be integrated (TT. 24-25, 29, 60). Their advice to Negroes was to "start taking reservations for Africa," where they should migrate (TT. 61).

Frankly advocating the doctrine of white supremacy, the speakers nevertheless expressly cautioned their audience against resort to violence, for "they think we advocate it, we don't. This is a political battle pure and simple, that's all it is" (TT. 14). They urged: "I want you people really hollering. No violence, just hollering" (TT. 30). They advocated "a non-violent shout, that every local politician is going to hear" (TT. 62).

Each speaker in turn referred to Negroes as "niggers" (T. 36). Rev. Charles (Connie) Lynch (TT. 33), one of the rally speakers, explained that "every time you call a nigger a colored person, you are apologizing to them because they're black" (TT. 34). Jews were also vilified (TT. 32-33, 37) and the United States Supreme Court caustically criticized (TT. 31, 38-39).

At the August 17th hearing, the County Attorney informed the Court that his witnesses would testify about "what might occur should these demonstrations, rallies, and speeches be allowed to continue" (T. 7). The testimony at the hearing showed that about 25% of the maximum audience of 200 were Negroes (T. 36, 37, 54). According to the testimony of a plainclothes policeman assigned to the rally area, the Negroes remained apart from the whites and "did not mingle among the other groups" (T. 55). Though the Negroes were visibly "disturbed and angry," they "stayed over on this side of the street" (T. 55). There was tension among the whites, but there was no breach of the peace, cause for arrests, or need for police intervention (T. 48, 56, 58). About 60 police officers, including reenforcements from other counties, were on hand (T. 38).

Over the objection of petitioners' counsel, the trial court admitted evidence of unrest and violence in Somerset County in February, 1964, nearly three years earlier, during mass civil rights demonstrations by students at a nearby Negro college demanding that public accommodations be open to all regardless of race (T. 13-25, 34). At that time the violence had been preceded by talk of "murder" and "killing" in "many sections of town" (T. 15). When a disturbance involving several hundred Negro students and local whites occurred, local police were able to bring it under control without reenforcements (T. 16, 22). Neither the National States Rights Party nor the individual petitioners were in Somerset during the 1964 incidents (T. 20). The college was not in session when petitioners spoke on August 6, 1966 (T. 60). Since the February 1964 demonstrations, there had been little racial tension in the town (T. 69). On cross-examination, an officer testified that race relations before the incidents of February 1964, and thereafter had been good (T. 56-57).

Paul J. Randall, a captain in the Maryland State police, testified that before the rally, one of the participants, Joseph Carroll, inquired about the local law regarding the use of a public address system and the sponsorship of a rally on the street (T. 33). Captain Randall informed Carroll that the town manager had said that no local ordinance prevented the rally (T. 34). Captain Randall requested Carroll and Stoner not to mention two pending court cases in which Negroes were accused of raping whites (T. 43). He testified that in fact no mention of these cases was made (T. 44). Mention was made of a rape of a seventy-six year old woman thirty-three years ago and of the lynching that followed, but the speaker said: "I am not

advocating this but I am just recounting a bit of history" (TT. 12). The rally ended ten minutes after a prearranged signal passed from Captain Randall to Carroll when Captain Randall nodded to Carroll that "tension was building" (R. 48).

On August 30, 1966, the Circuit Court for Somerset County issued an order barring the individual petitioners from "holding or sponsoring or speaking" at any public gathering or in any public place on any subject for ten months (R. 36). The Party was enjoined for ten months from participating in public gatherings at which "racial or religious epithets" or language expected to lead to rioting or disorder were used (R. 36; App., *infra*, pp. 13a-17a).

On June 7, 1967 the Court of Appeals of Maryland affirmed the temporary order of August 7, 1966 but reversed the interlocutory order of August 30, 1966, holding that "the period of time was unreasonable and that it was arbitrary to assume that a clear and present danger of a civil disturbance and riot would persist for ten months" (R. 50-51; App., *infra*, p. 12a).

The constitutional questions presented were raised by petitioners at trial (T. 8) and explicitly rejected by the trial court in its opinion (R. 34-35; App., *infra*, pp. 13a-17a). Petitioners again raised the constitutional issues in their Motion to Shorten Time for Transmission of Record (R. 44). The same questions were raised on appeal and treated fully on the merits in the opinion of the court below (R. 50; App., *infra*, pp. 1a-12a).

Reasons for Granting the Writ

I.

The temporary injunction barring petitioners' participation in public meetings was a prior restraint on speech in violation of the First Amendment.

Petitioners' August 6, 1966 meeting did not result in the arrest or prosecution of any of its participants—for no crime was committed. Nonetheless, respondents determined to prohibit petitioners from conducting other meetings on the ground that "if the defendants are permitted to carry on these harangues and incendiary rallies . . . the whole of Somerset County will be in danger of riots . . ." (R. 6), and secured the *ex parte* injunction at issue here. Respondents thus exercised the power to impose a prior restraint upon speech, a power which this Court has long condemned. *Near* v. *Minnesota*, 283 U. S. 697 (1930); *Hague* v. *C. I. O.*, 307 U. S. 496 (1938); *Bantam Books* v. *Sullivan*, 372 U. S. 58 (1963); *Freedman* v. *Maryland*, 380 U. S. 51 (1965). See 4 *Blackstone's Commentaries* 152 (Wendell's ed. 1850).

In *Near* v. *Minnesota*, *supra*, the State attorney sought to enjoin as a public nuisance a "malicious, scandalous and defamatory" publication. 283 U. S. at 703. But this Court rejected prior censorship where a remedy might later be pursued to punish an evil whose suppression in advance would involve a restriction on free expression. Cf. *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *Burstyn* v. *Wilson*, 343 U. S. 495 (1951); *Bantam Books* v. *Sullivan*, *supra*.

Kunz v. *New York*, 340 U. S. 290 (1950), specifically prohibits the prior restraint at issue here. Kunz was denied a permit to hold religious meetings "based on evidence that he had ridiculed and denounced other religious groups at his meetings." *Id.* at 292. This Court found that the court below had erred in relying on evidence that "appellant's religious meetings had, in the past, caused some disorder." *Id.* at 294. In the case at bar, the state's evidence is even more remote, for it relied on stale events in which petitioners were not even participants. As this Court said in *Kunz*: "There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence." *Ibid.* See Konvitz, *Fundamental Liberties of a Free People* 184 (1957).[5]

In *Rockwell* v. *Morris*, 211 N. Y. S. 2d 25, 32-33 (1961), the New York Court of Appeals, relying on *Near* and *Kunz*,

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[5] In a recent decision, the United States District Court, District of Maryland, required that a permit be issued to these petitioners to speak in Baltimore. *Norton* v. *Ensor*, 269 F. Supp. 533 (1967). There, as here, the denial of the permit was based on "previous activities of the applicants and the Party . . . [s]pecifically . . . a tape recording and films of the rallies. . . ." The Court found that:

> Defendant considers, and the Court agrees, that the evidence shows that speakers at those rallies incited persons in attendance to riot. Many participants in the rallies did riot, attacking Negroes who lived almost six blocks from the site of the rally. Photographs of such attacks were offered in evidence.
>
> Later in the summer a similar rally was held in Princess Anne, Somerset County, Maryland, where inflammatory speeches were made but violence was averted by the arrival of a large number of State Troopers. *Id.* at 536.

Nonetheless, the District Court held the relevant ordinance, in part, an "impermissible prior restraint upon plaintiffs' right of free speech and assembly," *id.* at 537, and ordered the permit to be issued.

reversed the denial of a park permit to George Lincoln Rockwell, late head of the American Nazi Party. The lower court had dismissed Rockwell's petition because it found that he was a "'self-confessed advocate of violence' and that if he spoke it was 'inevitable that public disorder and riot will result.'" *Id.* at 28. The Court of Appeals said:

> Only if Rockwell speaks criminally (or, perhaps, if it is established on a proper record, in that very rare case, that he will speak criminally, not because he once did, but that he will this time, and irreparable harm will ensue) can his right to speak be cut off. If he does not speak criminally, then, of course, his right to speak may not be cut off, no matter how offensive his speech may be to others. Instead, his right, and that of those who wish to listen to him, must be protected, no matter how unpleasant the assignment.

The fact that the ten day period was to allow for a "judicial remedy," does not cure the harm done to First Amendment rights by the prior restraint. *Cantwell* v. *Connecticut,* 310 U. S. 296, 306 (1940). The harm is the restraint itself. *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Hague* v. *C. I. O.,* 307 U. S. 496 (1939); *Schneider* v. *Irvington,* 309 U. S. 147 (1939); *Jamison* v. *Texas,* 318 U. S. 413 (1943); *Niemotko* v. *Maryland,* 340 U. S. 268 (1951); *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953). This Court should reaffirm the principle that "subsequent punishment for such abuse as may exist is the appropriate remedy, consistent with constitutional privilege." *Near* v. *Minnesota, supra* at 720.

II.

The temporary injunction was an unconstitutional intrusion on free speech because no clear and present danger existed.

Terminiello v. *Chicago,* 337 U. S. 1 (1948), *Edwards* v. *South Carolina,* 372 U. S. 229 (1963), and *Cox* v. *Louisiana,* 379 U. S. 536 (1964), require that certiorari be granted because the decision of the court below, which justified the issuance of the *ex parte* injunction upon the existence of a clear and present danger (App., *infra,* p. 9a), is not in accord with these decisions.

Terminiello involved an advocate of racism and anti-Semitism in the post-war period when popular sensibilities were especially hostile to his views. There, a thousand persons had gathered "to protest against the meeting," and the police were not able to prevent several disturbances.[6] Terminiello was convicted of disorderly conduct. Reversing the conviction, this Court said:

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. 337 U. S. at 4.

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[6] Compare the extent of the actual disturbance in *Terminiello* to the facts of the case at bar. 337 U. S. at 14-15.

Petitioners, like Terminiello, belong to a controversial minority which believes that Negroes and Jews are responsible for society's ills. Like Terminiello they can expect to encounter hostile audiences and crowds. They must nonetheless be protected in their right to speak, no matter how controversial or provocative their beliefs may be.

Edwards and *Cox* also teach that neither the unpopularity of the speaker nor the hostility of the crowd can provide a constitutional basis for curtailing speech.

Edwards involved the denunciation of segregation in the South in 1961 which resulted in arrests for breach of the peace. This Court reversed the convictions, for, as in the case at bar, "There was no violence or threat of violence on [petitioners'] part, or on the part of any member of the crowd watching them. Police protection was 'ample.'" 372 U. S. at 236. In *Cox,* the racial issue had pitted two thousand angry Negro college students against a crowd of "'muttering' and 'grumbling' [white] onlookers." 379 U. S. at 543. This Court reversed Cox's conviction for disturbing the peace despite his advocacy of the then illegal action of sitting at segregated lunch counters and his advocacy of resistance to police orders. 379 U. S. at 542-543. Again this Court rested its reversal on *Terminiello.*

The Court below disregarded the *Terminiello* line of decisions, relying instead on *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942) and *Beauharnais* v. *Illinois,* 243 U. S. 250 (1952).

Though *Chaplinsky* carved out an area of speech embracing "face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking con-

stitutes a breach of the peace by the speaker," 315 U. S. at 573, the court below relied upon that decision to restrain a political speech to an audience of two hundred.

Reliance on *Beauharnais* v. *Illinois, supra,* is similarly misplaced in light of this Court's more recent decisions. As was said in *Time, Inc.* v. *Hill,* 385 U. S. 374, 390-391 (1967), ". . . the First Amendment principles pronounced in *New York Times* [have] guided our conclusions in First Amendment cases since 1964." Yet they provided no guide to the court below in this case. If the "epithet 'libel' " has assumed new meaning in our law, as *New York Times* and *Garrison* v. *Louisiana,* 379 U. S. 64 (1964) make clear, then the scope of *Beauharnais* requires fresh examination.[7]

Whatever the complexities of decisions affecting this area, it remains true that "the character of every act depends upon the circumstances in which it is done." *Schenck* v. *United States,* 249 U. S. 47, 52 (1919). In the First Amendment area this has meant that this Court considers cases "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open. . . ." *New York Times* v. *Sullivan, supra* at 701. Petitioners have insisted upon the most provocative exercise of their First Amendment

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[7] "Beauharnais v. Illinois . . . should be overruled." *Garrison* v. *Louisiana,* 379 U. S. at 82 (Douglas and Black, JJ., concurring). See also Clark, The Problem of Group Defamation, 13 Cleveland-Mar. L. Rev. 1, 3 (1964); Chafee, Government and Mass Communications 116-130; Kalven, The First Amendment and the Negro, Chap. 1; Cahn, The Predicament of Democratic Man 135-139 (1961); Reisman, Democracy and Defamation, 42 Col. L. Rev. 727, 742-743; Emerson, Towards a General Theory of the First Amendment, 72 Yale L. J. 877, 924 (1963).

rights. It is one thing to punish them if their conduct becomes criminal; it is quite another thing to silence them for fear that it will.

III.

This case is not moot.

Last term, in *Walker* v. *Birmingham*, 388 U. S. 307 (1967), this Court held that the constitutional validity of an injunction could not be tested by violating its terms. A party whose rights under the First Amendment are enjoined are now expected to pursue "orderly judicial review" whether or not the injunction is arguably or unarguably unconstitutional. 388 U. S. at 321. Cf. *Fields* v. *Fairfield*, 375 U. S. 248 (1963). If petitioners, on the one hand, are not to "bypass orderly judicial review" and, on the other hand, are to be out of court because judicial review effectively moots their claim, *Walker* v. *Birmingham* can fairly be said to have fashioned a rule of law that emasculates the First Amendment.

Furthermore, though the ten-day injunction at issue here has expired, its effects have not. By letter of July 12, 1967 (App., *infra*, p. 20a), the attorney for the Princess Anne Commissioners denied petitioners the right to hold a rally in Princess Anne on July 17, 1967, referring specifically to the decision of the Maryland Court of Appeals in this case.

> Regardless of the date the Commissioners have determined not to issue a permit for the use of sound making or sound reproducing devices under the provisions of Ordinance 22B (46)-1. On the basis of your past record the Commissioners have valid reason to believe that your proposed rally will be similar in

> purpose and intent in performance to your most recent rally in this town and your record of appearances in other areas. In view of the decision of the Maryland Court of Appeals filed June 7, 1967 in No. 525 September Term, the Commissioners do not feel that your rally will fall within the definition of freedom of speech as set forth by the Court of Appeals and by a long series of Supreme Court cases.

Thereafter, on July 25, 1967, the town through its attorney granted permission to hold rallies on July 28, 29, and 30, 1967, provided that the sound was amplified for no greater distance than 250 feet. In addition, however, the letter says that "you will not be permitted to use racial epithets or to make slanderous remarks about the members of any race or ethnic group." App., *infra*, p. 23a. Petitioners have not attempted to hold rallies in Princess Anne since August 6, 1966, and they have been denied permission to speak in other parts of the State. See letters, App., *infra*, pp. 18a, 19a, 24a.

The suppression of petitioners' speech is revealed in the letters from Princess Anne and other Maryland officials. It is the direct result of the decision of the Maryland Court of Appeals in this case and demonstrates that while the injunction has nominally expired, it still effectively defeats the exercise of petitioners' First Amendment rights in Maryland.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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